



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

ANDY BESHEAR
ATTORNEY GENERAL

OAG 17-025

CAPITOL BUILDING, SUITE 118
700 CAPITOL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

October 25, 2017

Subject: Constables' participation in the County Employees Retirement System.

Requested by: Jeff D. Jacob, Fayette County Constable, District #1

Written by: Sam Flynn

Syllabus: The Lexington-Fayette Urban County Government is not required to permit Constables to participate in the County Employees Retirement System.

Statutes construed: KRS 78.510, KRS 78.540.

OAGs cited: OAG 90-85, OAG 90-133, OAG 95-11, OAG 91-175, OAG 74-257, OAG 74-43.

Opinion of the Attorney General

Jeff D. Jacob, Fayette County Constable, District #1, has requested an opinion from this office on whether or not the Lexington-Fayette Urban County Government ("LFUCG") must permit constables to participate in the County Employees Retirement System ("CERS"). We advise that LFUCG is not required to permit constables to participate in CERS.

The County Employees Retirement System is governed by KRS 78.510 *et seq.* By statute, membership in CERS "shall consist of ...[a]ll persons who becomes *employees* of a participating *county* after the date such county first participates in the system..." KRS 78.540(1) (emphasis added). Our opinion turns upon the applicable definitions of these two terms.

First, constables are not part of the "county" as that term is defined for CERS purposes. *See* KRS 78.510(3). The definition of "county" in this context is broader than the normal meaning of the term and includes several additional entities and some constitutional officers. *Id.* Specifically, the definition includes:

- 1) Any county; and
- 2) A nonprofit organization created and governed by a county, counties, or elected county officers; and
- 3) The sheriff and his employees; and
- 4) The county clerk and his employees; and
- 5) The circuit clerk and his deputies, former circuit clerks, and former circuit clerk deputies; and
- 6) Political subdivisions and instrumentalities, including school boards, charter county governments, and urban-county governments.

KRS 78.510(3); *see also* OAG 90-133 (construing definition of "county").¹

While KRS 78.510(3) does include some constitutional officers within the definition of "county," it expressly excludes others. Constables are county district constitutional officers. *See* Ky. Const. § 99.² Indeed, the Kentucky Court of Appeals recently opined, "the office of constable, recognized as an elected constitutional office, is established in Section 99 of the Kentucky Constitution." *See Whitlock v. Rowland*, 453 S.W. 740, n. 2 (Ky. App. 2015). However, Constables are not included in KRS 78.510(3)'s definition of "county." Because some constitutional officers are enumerated in the definition of "county" under CERS, and

¹ For further illustration of the various types of entities that participate in CERS, see "Agencies Participating with Kentucky Retirement Systems," available at <https://kyret.ky.gov/Employer%20Reporting%20Resources/Participating%20Employer%20Listing%20by%20Type.pdf> (last accessed June 7, 2017).

² Ky. Const. § 99 provides:

At the regular election in nineteen hundred and ninety-eight and every four years thereafter, there shall be elected in each county a Judge of the County Court, a County Court Clerk, a County Attorney, Sheriff, Jailer, Coroner, Surveyor and Assessor, and in each Justice's District one Justice of the Peace and one Constable, who shall enter upon the discharge of the duties of their offices on the first Monday in January after their election, and who shall hold their offices four years until the election and qualification of their successors.

constables are not, we advise that constables are not part of the "county" for CERS purposes.

Next, we turn to whether constables are "employees" of the county. The plain language of the statute, the facts underlying the present request, and legislative history of the definition of "employee" indicated that Fayette County constables are not "employees" of LFUCG.

By statute, "employee" includes every regular full-time appointed or elective officer or employee of a participating county **and the coroner** of a participating county, whether or not he qualifies as a regular full-time officer. KRS 78.510(6) (emphasis added).

Initially, we note that like KRS 78.510(3) with respect to the definition of "county," language pertaining to constables is conspicuously absent from the list of persons defined as "employee," under KRS 78.510(6). The Kentucky Supreme Court has stated, "[a] general rule of statutory construction provides that the enumeration of particular items excludes other items that are not specifically mentioned." *Com. v. Harris*, 59 S.W. 3d 896, 900 (Ky. 2001) (internal citation omitted). Failure on the part of the General Assembly to have included any reference to constables and their employees.

Further, KRS 78.510(6) indicates that appointed or elective officers must have "regular full-time" status to qualify as employees. Although Fayette County constables are paid out of the county treasury pursuant to KRS 64.200, as LFUCG opined in response to this office's request, constables are not full time elective officers. Rather, Constables' duties do not require performance at specified times. See OAG 91-175. Instead, they have "little or nothing to do." OAG 77-257.

Notably, LFUCG does not control who is hired or terminated from the Constable's employ. See also, OAG-90-85. This office has previously determined that a fiscal court is not required to supply or pay for the cost of an office for the constable. See OAG 95-11 (overruling OAG 74-43). In particular, this office opined:

....that absent express statutory direction that a constable be furnished with specified resources, or perhaps the statutory imposition upon constables of a broad range of specific duties comparable to the duties imposed upon a sheriff, the allocation of county funds to provide a constable with an office and equipment is a decision that lies within the discretion of the fiscal court.

OAG 95-11.

Moreover, this Office has previously recognized, in a different context, that Constables are not county employees. *See* OAG 91-175 (noting that a county fiscal court may hire a Constable to perform other duties, including transportation of prisoners).

Next, the statute confirms that coroners are included in the definition of employee regardless of his or her full time status. The General Assembly specifically included coroners in the definition of "employee" for CERS purposes.

The legislative history of KRS 78.510 further indicates that constables are not "employees" of the "county" for CERS purposes. When KRS 78.510 was enacted in 1958, the definition of "employee" included:

The judge of the county, county court clerk, county attorney, sheriff, jailer, coroner, surveyor, county commissioners, **justice of the peace and constable**, and all compensated employees [sic] assisting these officials in the performance of their official duties shall be considered county 'employees' [sic] within the meaning of the [CERS Act].

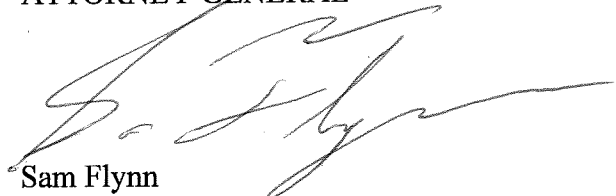
1958 Ky. Acts Ch. 167 § 1.

This entire sentence was stricken from the statute in a 1962 amendment. 1962 Ky. Acts Ch. 31, § 1. However, in 1984, the General Assembly again amended the statute, this time adding the phrase "the coroner of a participating county, whether or not he qualified as a regular full-time officer" to the definition of "employee." 1984 Ky. Acts Ch. 198 § 1. The most reasonable inference from this

legislative history is that the General Assembly did not intend for constables to be deemed county "employees."

Therefore, we advise that LFUCG is not required to permit constables to participate in CERS. We further advised that the General Assembly has provided a mechanism for determining whether an individual is eligible to participate in CERS. "In case of any doubt, the [The Board of Trustees of Kentucky Retirement Systems] shall determine if a person is an employee within the meaning of KRS 78.510 to 78.852." KRS 78.510(6). We encourage you to seek a final determination of this question from the KRS Board of Trustees.

ANDY BESHEAR
ATTORNEY GENERAL



Sam Flynn
Assistant Attorney General